No. 15,381

IN THE

United States Court of Appeals

For the Ninth Circuit

EARL G. ARONSON, Administrator of the Estate of Flora Ritta Mae Aronson, Deceased, for the benefit of said Estate and Earl G. Aronson, surviving husband and Earlene A. Roberts, Betty C. Howard and Earl G. Aronson, Jr., surviving children of said decedent,

Appellant,

vs.

GEORGE A. McDONALD,

Appellee.

Appeal from the District Court for the District of Alaska, Fourth Division.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

I.

STATEMENT OF THE CASE.

Appellant's statement of the case is a fair summary of the pleadings, and of appellant's motion to amend. Excepting for a reference to Identification No. 5 the statement is barren of any summary of the evidence. In that the basic attack of appellant is directed toward

the court's findings, we believe a summary of the facts should have been presented.

Trial proceeded on the issue of liability only (Tr. 33). Two persons survived the crash, Mrs. John Dickerson and George McDonald Jr., who was 15 years of age at the time of the collision (Tr. 78, 117). Mrs. Dickerson testified orally, and Mr. McDonald, Jr., by deposition. The ladies noted in the complaint, and this boy, were acquaintance through church work in Fairbanks, and planned a trip by auto to Anchorage as a vacation undertaking. The vehicle was that of George McDonald, and was driven by his wife. The party shared the expenses of the trip in other respects (Tr. 48, 49; 62-63). The party proceeded to Anchorage, a community some 435 miles south of Fairbanks (Tr. 83); visiting there, and at Seward, a community about 128 miles south of Anchorage (Tr. 45). On the day prior to the accident the party left Anchorage about noon, then headed for Fairbanks after a brief visit in Palmer, a community about 50 miles north of Anchorage and on the highway (Tr. 46-48). The historic major highway in Alaska is the Richardson, a road connecting Fairbanks with Valdez, a seaport south of Fairbanks. The road from Anchorage, called the "Glenn Highway", leads northeast following a valley north of the coastal range of mountains, and intersects the Richardson Highway at a point known as "Glenallen". This point is 189 miles from Anchorage. From there the Richardson leads south to Valdez, 115 miles distant; and north to Fairbanks, 249 miles distant. The Richardson Highway is marked by

"Mile-posts", numbered progressively north from Valdez, point "0".

After leaving Anchorage the party expressed an interest in a side trip to see Valdez (Tr. 47, 48, 61). In that most of them favored such a side trip, when the Glenallen junction was reached the driver turned toward Valdez (Tr. 48). At that point the party was 115 miles from Valdez, and no objection was made to the side trip (Tr. 48, 58, 61, 83, 86, 87, 128). The party passed the Copper Center settlement (101 miles north of Valdez) and the Tonsina Lodge (79 miles north of Valdez) and encountered a section of highway under construction (Tr. 49). Along this section of highway at a point north of 57 mile (at 62 mile by Mrs. Dickerson, Tr. 50; and 58 mile by McDonald, Tr. 99) the driver crossed a ridge of dirt in the road to let traffic pass. In so doing evidently a rock was struck in a manner breaking a hydraulic brake line, allowing all of the fluid to escape, and leaving the vehicle without foot brakes. The party then decided to go forward toward Valdez to seek repairs (Tr. 50, 59, 67, 68, 89-92, 131, 133, 172).

There was no objection made to proceeding without brakes (Tr. 50, 59, 61, 92, 94, 95, 135) although the danger in so doing was fully appreciated by the passengers (Tr. 61, 62, 69, 171).

Mrs. McDonald proceeded forward with due care using the handbrake to control excess speed (Tr. 63, 67). This damage occurred about 8:30 in the evening (Tr. 52), or perhaps nearer 12 midnight (Tr. 97).

A stop was made at mile 57 (Tr. 57, 62), but the garage there could not make the repairs. But the party decided to go forward, rather than stay at this point, even though they were unfamiliar with the road (Tr. 49, 99, 105), and had no maps or guide book covering the area (Tr. 60, 129).

The country in this area is rolling hills, and the roadway climbs from about 47 mile into the costal range of mountains, crossing at a point known as Thompson's Pass, at 26 mile (Tr. 187, 189-90, 195, 196, 199); and as the party went forward night gathered dark and soon heavy fog settled over the road. The thick fog caused Mrs. Dickerson to ask that they stop, and this being done, a prayer meeting was held (Tr. 53, 64-65, 105).

Soon the driver thought she could see ahead, and said they may as well go forward (Tr. 66, 108, 170), which was done without objection. Within a short distance the roadway began to descend, and it was on this descent that the fatal accident occurred (Tr. 55, 113). As the car gathered speed the driver sought to control it with the handbrake. Soon this brake began to smell, and the car to gain momentum. The driver then pulled the handbrake clear on, and discovered that it had burned out and was completely ineffective. She then attempted to gear down. The type of transmission was semi-automatic, having reverse, neutral, drive and low ranges, each activated by the clutch (Tr. 124, 209, 212, 271-77). When the driver attempted to gear down she put the transmission in neutral, but failed to attempts to force it into low range, or reverse

(Tr. 69, 70, 71, 72). The car then free wheeled down the incline, having achieved by then a speed of 65-70 miles per hour (Tr. 111). The driver then turned off the ignition, and tried her best to ride out the speed of descent. Some 3 to 3½ miles from the top of the Pass the vehicle left the road (Tr. 55-113) and only Mrs. Dickerson and George McDonald Jr. survived the crash.

The hill is a steep grade, from 6 to 10% without relief, having several curves (Tr. 56, 57, 65, 110, 141, 176, 199, 200, 233). About two miles from the summit is the first curve, around which a safe speed would be 30 miles per hour (Tr. 292). This curve was taken by the driver. Then the road drops *7 miles* more at a grade over 7% (Tr. 293, 294) *at the bottom of which is a curve around which a safe speed would be 25-30 miles per hour* (Tr. 292). The car left the road about 5½ miles before reaching this bad curve at the bottom of the hill.

II.

ARGUMENT.

As an aid in following the briefs, appellee's argument will be broken into sections following the alphabetical Statement of Points by appellant.

POINT (a) THE TRIAL COURT ERRED IN DISALLOWING APPELLANT'S MOTION TO AMEND COMPLAINT TO INCREASE THE AMOUNT OF DAMAGES.

Argument.

This amendment was offered at the time of trial (Tr. 29) and objected to by appellee as not timely, among other points (Tr. 31). The court reserved ruling, saying (Tr. 33):

> "It is true that this same question has been previously before the Court, and at that time I looked into it carefully and made what I considered to be a proper ruling. I do not wish to foreclose any additional arguments on the part of counsel and will certainly permit other cases to be shown. I know that the Ninth Circuit Case, United States v. Standard Oil was before me at the time I formerly ruled. Whether I was right or wrong in that ruling, I don't know. I have two or three things in mind at this time: first, whether the motion is timely; if it is, whether it is meritorious; and the third proposition that I have in mind may be moot, depending on what develops. I can see no harm to be done to any of the parties if I should reserve the ruling at this time, and I was about to suggest that we might try out the question of liability in the case before us for trial and, if liability is established, then of course the ruling would be very germane.
>
> Do counsel have any objection to trying out the question of liability, restricting all evidence to the question of liability first and, if liability is established, then we can go into damages."

Trial proceeded, limited to the question of liability. This issue having been terminated against plaintiff,

the proceeding ended (Tr. 300-302). *After* ruling on the merits, the court said (Tr. 302):

> "Now, in the hope that it might be raised on appeal, perhaps I am wrong in saying that the question is moot, because plaintiff's counsel has urged on me again to rule on the motion to amend the complaint to increase the amount. So as to clarify the record in that respect and to give the plaintiff any possible benefit of the ruling, I will deny the motion to increase the amount, hoping that that might be reviewed on appeal."

There appears to be no question but that this issue was moot before the trial court; and that it is also moot here. Nothing can be claimed as error on appeal justifying a reversal which would not affect the result reached by the lower court. Accordingly the ruling of the lower court on this point cannot be made the basis for a reversal.

Should this court reverse the lower court's decision on other points, then this court may, if it chooses, comment on this point. An expression of the court's views would be helpful to the trial court and counsel. We comment on counsel's argument with only this view in mind. The 1955 Alaska Wrongful Death Act, ch. 153, S.L.A. 1955, is not applicable to this case because of the provisions of Section 19-1-1, ACLA 1949. This section, a common type of savings statute, reads as follows:

> "The . . . amendment of any statute shall not affect . . . any act done or right accruing or accrued or any action or any proceeding had or commenced prior to . . . such amendment; . . ."

And that is this case. The accident occurred July 30, 1953. This action was commenced October 7, 1953. The Act was amended effective June 28, 1955, [Approved March 28, 1955, and effective 90 days thereafter; § 14, Organic Act 4-3-3, ACLA 1949].

The amendment came after this action was commenced. The foregoing statute is clear in its language; and applied to the facts of this case, it does, without question, bar consideration of the amendment as applicable to this action.

Following the semi-colon which ends the above quotation from Section 19-1-1, the statute deals with the release or extinguishment of a penalty, forfeiture or liability. This case involves neither the release nor the extinguishment of a penalty, forfeiture or liability and therefore this part of the savings statute is not pertinent.

Appellant relies on *United States v. Standard Oil Company of California* (S.D. Cal. N.D. 1937), 21 F. Supp. 645; aff'd (9th cir. 1940), 107 F. 2d 402. This case says that since at common law interest, as an element of damage in a conversion action, was discretionary with the court, therefore a statute fixing interest from this date of conversion conferred no vested right that could not be subsequently abrogated by a statute retroactive by its terms.

At common law the right of action for injury abated upon the death of the person injured. Accordingly the right created by the statutes is to damages, and the indemnity is limited to the statutory limitation. The

situation presents no comparison with that in the *Standard Oil* case (supra).

The situation in this case is not new. Often legislatures have raised the limits of the recovery under wrongful death acts; and the courts have consistently refused to apply the new sum as the measure in either pending cases, or causes arising prior to the amendment.

Field v. Witt Tire Co. of Atlanta, Ga. (2d Cir. 1952), 200 Fed. 74;

Theodosis v. Keeshin Motor Express Company, Inc. (Ill. 1950), 92 N.E. 2d 794;

Keeley v. Great Northern Ry. Co. (Wisc. 1909), 121 N.W. 167 at 170.

See also Annotation: 77 A.L.R. 1338.

POINT (b) THE TRIAL COURT ERRED IN REFUSING ADMISSION IN EVIDENCE OF APPELLANT'S IDENTIFICATION NO. 5.

Argument.

Appellant failed to point out in his brief wherein this error, if it be error, affected substantial rights of appellant. Rule 61, F.R.C.P. This same witness in his testimony (Tr. 291, 292, 293, 294, 295) gave his personal estimate of the grades and distances involved. He testified thereto as independent oral evidence, not related to the exhibit. His testimony was not correlated to the exhibit, or attempted to be, as a foundation therefor, and the identification was not thereafter offered. Other witnesses for appellant and witnesses for appellee also described the road grade and dis-

tances. There was very general agreement among all these witnesses as to the facts, and it is not asserted that Mr. Isto's figures, if admitted, would impeach any witness, show any different condition, or lead the trial court to any different ruling on liability.

Accordingly appellant has not shown wherein this error, if one it be, is a basis for reversal of the trial court's ruling.

This identification is a topographical map of the area around Thompson Pass, prepared and printed by the United States Government. There had been written in ink on it lines and figures purporting to show the various degrees of grade of the highway leading down from Thompson Pass toward Valdez. Appellant's witness, Emmet Botelho, testified that the lines and figures had been written on the map by a Mr. Isto, an employee of the United States Geological Survey, the figures having been obtained by Mr. Isto from a map in the Survey office. The introduction of the map was objected to by appellee as hearsay and was excluded by the trial court (Tr. 287-289).

> "Hearsay evidence is testimony in court or written evidence of a statement made out of court, such statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." McCormick on Evidence, 1954, § 225, p. 460. See also 5 Wigmore on Evidence, 3rd E. § 1362.

When this definition of hearsay evidence is applied to appellant's Identification No. 5, it becomes apparent

that the Identification is hearsay, if not double hearsay. The map was sought to be introduced for the purpose of introducing into evidence the written statements made on it out of court by Mr. Isto; the written statements of Mr. Isto were an assertion of the highway grades leading from the top of Thompson Pass toward Valdez, and were offered to prove the truth of the assertion. The probative value of the written lines and figures thus rests on the credibility of Mr. Isto, who was not present in court to testify and be subjected to cross-examination.

In his brief appellant argues that the identification was admissible because it was only necessary for Mr. Botelho to testify that the map correctly represented the scene; not that he prepared it. While it is true that maps, photographs, etc. need not be prepared or taken by the witness through whom they are sought to be introduced, the theory being that once the witness testifies that they accurately portray the scene, the exhibit is the non-verbal testimony of the witness. Appellant's Identification No. 5 does not come within this rule of law. The identification was not introduced as the non-verbal testimony of Mr. Botelho, but as the testimony of Mr. Isto.

POINT (c) THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE APPELLEE AND PARTICULARLY ERRED IN ADOPTING FINDINGS OF FACT NUMBERS VI, VII, AND VIII.

POINT (d) THE TRIAL COURT ERRED IN ADOPTING CONCLUSION OF LAW NUMBERS I, II [AND III, PROPERLY CONSIDERED UNDER POINT (e)].

Argument.

Appellant's presentation of his arguments relating to these claimed errors is largely factual, and appears more logically treated under one heading.

The offending Findings and Conclusions are as follows:

Findings

VI.

"The operator of the vehicle then proceeded to drive toward Valdez, Alaska, without brakes, in the night-time, and on a road unfamiliar to her or to any passenger after consultation with her guests, without objection by her guests and with the consent of her guests, including plaintiff's decedent. That the party stopped at a roadhouse at 57 mile seeking repairs; and again proceeded onward without objection by and with the consent of decedent's intestate. That the party encountered heavy fog and stopped by the road at a point on or near the summit of Thompson's Pass. That again the party proceeded forward without objection by and with the consent of decedent's intestate."

VII.

"That the operator of the vehicle encountered a long descent unknown to her and upon which she

was unable to control the vehicle with the hand brake. That the hand brake burned out and the vehicle accelerated by gravity on the descent to a speed causing the vehicle to leave the roadway and overturn. That the proximate cause of the accident and the fatal injuries to plaintiff's intestate was the operation of said vehicle without brakes."

VIII.

"That said vehicle was in all other respects being operated by defendant's wife with the exercise of ordinary care; and that defendant's wife was in no other respect negligent."

Conclusions

I.

"That defendant's wife, Naomi McDonald, was negligent in operating a vehicle without brakes; and that said negligence was one of the proximate causes of the fatal injuries to plaintiff's decedent."

II.

"That plaintiff's decedent was contributorily negligent in continuing to ride in said vehicle so operated without remonstrance or objection, and became a co-adventurer in, or assumed the risk of proceeding in the face of the danger and conditions and circumstance, which negligence on her part contributed as one of the proximate causes of her fatal injuries, the same being a peril within the area of the risk assumed."

Exceptions to the Findings and Conclusions must be judged in the light of Rule 52(a), F.R.C.P., reading in part:

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given the opportunity of the trial court to judge the credibility of the witnesses. . . ."

It is well settled that the test is that a court will not hold a finding clearly erroneous unless the reviewing court from the entire evidence is left with a definite and firm conviction that a mistake has been committed.

United States v. Oregon State Medical Society (1952), 343 U.S. 326, 339; 72 S. Ct. 690, 698; 96 L. Ed., 978;

United States v. United States Gypsum Co. (1948), 333 U.S. 364, 395; 68 S. Ct. 525; 92 L. Ed. 746.

See also:

Kimberly Corporation v. Hartley Pen Company (9th Cir. 1956), 237 F. 2d 294, 300;

Nishikawa v. Dulles (9th Cir. 1956), 235 F. 2d 135;

Furukawa v. Ogawa (9th Cir. 1956), 236 F. 2d 272.

We assert that each Finding and Conclusion is well founded on evidence in the record, as appears from our Statement of the Case, supra. And with this assertion appellant takes no real factual issue [See appellant's brief, p. 18 under (d)].

The *factual* issue asserted by appellant's argument is that Mrs. McDonald should have geared down the car, and if she had done so, a safe descent of the hill

might have been made. Such "second guessing" or conjecture, is abhorent to the courts, the inquiry being directed only to that which a reasonable person would have done under like circumstances. The court allowed appellant to reopen his case to exhaust every facet of conduct open to the driver (Tr. 224-227).

> "The Court: Gentlemen, I wish the matter were as clear to me as it is to each one of you counsel. In my mind we have some very, very serious legal questions and factual questions upon which those legal questions may depend. I think, at least, I agree with defense counsel that if the accident were proximately caused by the defective foot brakes, then the plaintiff cannot maintain this action, because it is clear that she acquiesced in riding in the car, knowing of its dangerous condition—knowing it did not have foot brakes.
>
> "The fact that counsel has not commented on the features that are worrying me the most, or if you have commented, I didn't grasp your arguments, I want you to know that the things that is bothering me the most—suppose I should find, and I can, from the evidence—there was some discussion among the attorneys where this car was stopped when they had the so-called prayer meeting—but suppose I should find, as testified by the young man, that from where they had the prayer meeting after the fog lifted she could see—Mrs. Dickerson said she couldn't see even when they started up, but George McDonald said he could see and he saw there was a drop from there on, that is, right where they had the prayer meeting and the discussion as to whether they should go on or not, it was steep down ahead of them, trying to decide whether to go on without foot brakes. Now, sup-

pose [102] I should find all of that, the part that troubles me greatly is this: the plaintiff has the burden of proof in this, there is no doubt of that, but wherein in the evidence, and maybe you can point it out to me, do I find any credible evidence that it was, in fact, negligent for the driver of the car not to shift the level into low gear. Let us assume that that would be negligence, or let us not assume it. We can't assume it. Do I take judicial notice of the fact that had it been shifted into third gear that it would have gone down this particular mountain without mishap? Am I to take judicial notice of that fact? Am I a mechanic experienced enough, or supposed to be, to know the effect of that? I don't know how many miles it had on it, how much compression it had, I don't know how much it would have held it back had it been in second or third gear. I don't know a thing about it.

"I suppose plaintiff is going to say, 'We have the deposition of the boy and he gives an opinion' which he may or may not have been qualified to give, but he said in answer to this question I read from page 128:

> 'Q. Mr. Pipkin asked you based on your experience how in driving and your remembrance and recollection of what happened on that occasion, had she started down this hill in first gear and the hand brake set she probably could have made it?'
>
> 'A. She would have made it I am pretty sure because I have driven several cars with the same transmission setup and everything.'

"And then he goes on to tell some of his experiences in stopping the car, but is that the type of

evidence that I am to say is sufficient to sustain the burden of proof. That is the part that is bothering me.

"In other words, where in the evidence do I find this man, this boy who testified, doesn't show any familiarity with the particular highway in question, what would have been the result had the driver of the car put the transmission into a lower gear? I don't know. Am I to speculate against the defendant and find that the accident would not have happened or must I base such a finding on testimony, where is the testimony that this accident would not have happened had the driver of the car done something that the plaintiff claims she could have done and didn't do? Where is the evidence on that point?

"That is where I am bothered. As I say, am I to take judicial notice of what would have happened to that particular car had it been shifted into a lower gear?

"Mr. Johnson, I suppose that I am addressing that query to you, because that really has me bothered."

As a consequence, the matter was reopened, and the evidentiary point became a study of whether or not the driver *could have* controlled the car and safely managed the descent. Appellant's witness, James Hutchison, an expert and experienced driver of the type of car involved over the road involved, did testify as noted in appellant's brief, pp. 15 and 16; however, in response to the last question noted in the brief, his ultimate answer was:

"Q. (By Mr. Johnson) Could an ordinary driver do it?

A. I believe an ordinary driver could . . ." Tr. 269).

(Objection and ruling.)

"A. I believe that an ordinary driver could descend the Pass safely under control if he was on the ball and knew what he was doing. He could follow the procedure of dropping the gear, applying emergency brakes sparingly, and follow the shoulder of the road, *the soft shoulder and staying in that as much as possible.*" (Emphasis supplied.)

The court commented on this witness' opinions (Tr. 271), saying

". . . It seems obvious to me, and I decline to comment, and I wouldn't if it were a jury case, but it seems obvious to me that the witness has injected a lot of things that might have been done by the driver that are not within the testimony of the case . . ."

The court's summation of the case (Tr. 300-302) again disposes of this contention by appellant.

"Now we come to the stage of the proceeding that is indeed trying and difficult for me, but I feel that I must grant the defendant's motion to dismiss.

"I found during the trial, as you all know and as I have announced on more than one occasion, that the plaintiff's intestate was guilty of contributory negligence or at least assumed the risk of riding in defendant's vehicle, knowing that the foot brakes were worthless, and I heard further testi-

mony on the theory that the contributory negligence of the plaintiff's intestate, or if you prefer to call it the assumption of risk, became static [185] when the persons proceeded on and perhaps the plaintiff could predicate his claim on subsequent negligence of the driver of the car with full knowledge on the part of the driver and the plaintiff's intestate that the brakes were worthless and had no effect. So it was on that additional theory that we proceeded with the trial and heard testimony.

"The plaintiff rested, the defendant rested, and I indicated that I could see nothing in the evidence that would permit recovery. I couldn't see that the driver of the car had violated any duty that she might have owed to the plaintiff's intestate. So permission was given to reopen, and I was carefully trying to examine the evidence to see whether or not the driver of the car used reasonable care for her own safety and for the safety of others in starting down that long hill without putting the gearshift into the low gear. So then we had additional testimony, and one man, who is an expert, and I think I was very liberal in permitting the plaintiff's witness to testify, said that the car even in the low gear on the incline in question would gain a speed of from 70 to 75 miles per hour, and then the testimony of the plaintiff's witness brought in after I permitted plaintiff to reopen gave this answer, and I quote, and this is on direct-examination:

'I believe that an ordinary driver could descend that Pass safely under control if he was on the ball and knew [186] what he was doing. He could follow the procedure of dropping the gear, apply-

> ing emergency brakes sparingly, and following the shoulder of the road, the soft shoulder, and staying in that as much as possible.'
>
> "Now, I don't believe that ordinary care that is required of a person under the circumstances, and the defendant's wife was, required doing that which the expert witness said might have been done, because those aren't in my opinion driving measures that would be expected of any ordinary person, and I find nothing in the evidence to prove the negligence of the driver of defendant's motor vehicle such as would enable a recovery in this case, and I therefore grant the defendant's motion for dismissal."

It is clear that the court sought out every evidentiary factor helpful to plaintiff; and a reading of the entire record leaves one far from feeling the Findings erroneous, and, instead convinced that the trial court could not have reached any different result.

Appellant, while conceding assumption of risk in his brief, labors the point that the driver was negligent in not gearing down, to which negligence there was no assumption of risk or contributory negligence.

This argument is moot, granting substance to the Finding that the driver used ordinary care under the circumstance (Tr. 302) and need not be reached for comment by the court. Appellee in this connection reasserts the position taken at the trial, namely, that by failing to object to proceeding without brakes, appellant's decedent was negligent toward all of the risks inherent in operating an automobile without brakes, one of which is that if the brakes are not functioning

the driver of the automobile may not be able to control its speed while driving down hill, with resulting injury to passengers. In terms of assumption of risk, the event which occurred was within the scope of the risks appellant's decedent assumed. Hence plaintiff is barred from any recovery in this action.

The distinction between "assumption of risk" and "contributory negligence" [and as applied to the facts of this case no distinction is necessary] is well set forth in the case of *Landrum v. Roddy* (Neb. 1943), 12 N.W. 2d 82, cited by appellant. The contributory negligence in that case was an acquiescence toward hazardous driving conduct. Here the same thing can be said.

The following are sound authority for the position taken by the trial court:

1. Generally, on the question of contributory negligence: Prosser, *Torts,* 2d ed., § 51; *Restatement on Torts,* §§ 463-496 (see in particular § 466[a]; *Sharp v. Sproat,* 208 P. 613 (Kans., 1922); *Clise v. Prunty* (W. Va.), 152 S. E. 201.

2. Generally, on assumption of the risk and contributory negligence, see annotation in 138 A.L.R. 838.

3. Generally, on assumption of the risk, see Prosser, *Torts,* § 55, p. 303; *Knipfer v. Shaw,* 246 N.W. 328 (Wisc., 1933); *Landrum v. Roddy* (Neb., 1943), 12 N.W. 2d 82.

We comment on the cases cited by appellant:

The case of *Mesnickow v. Fawcett* (D.C. App. Cal. 1924) 278 Pac. 500 cited by counsel (Br. 17) does not

support his point. That was an action by a guest against the operator of *another vehicle,* in which the court said, in reply to the contention that the plaintiff was contributorily negligent for failure to warn

> ". . . and, beside this, the danger caused by the blinding of the passing lights was so sudden, and in such close proximity to the collision, that they had no apparent opportunity to warn the driver before the collision occurred."

Most of the cases cited by counsel for appellant deal with contributory negligence, not assumption of risk. We agree that with respect to contributory negligence the following statement from *Murphy v. Smith* (Mass. 1940) 29 N.E. 2d 726, cited by appellant on page 18 of the brief, is a fair statement of the rule:

> "In the last analysis, the rule governing a guest riding in an automobile is that he should conduct himself as an ordinary prudent person would, under the circumstances. If he does, he cannot be held negligent as a matter of law. Following the language adopted in the days of the stage coach and horse drawn vehicles, courts often added that he should call attention to apprehended danger; protest against fast driving, leave the automobile if it could be done with safety, or demand that it be stopped, and then get out of it. Such statements are only illustrations of what a reasonably prudent person might do under the circumstances. They do not constitute a legal standard of what a reasonable prudent person must do. The question is not whether the guest should protest against fast driving, call attention to apprehended danger, or demand that the car be stopped so that

> he could get out. The legal question is whether, under the circumstances he acted with the care that a reasonably prudent man would have used under the circumstances."

The case of *Williamson v. Fitzgerald* (D.C. App. Cal. 1931) 2 P. 2d 201, cited by appellant on page 18 of his brief does not substantiate the contention that "assumption of risk went out of the case at that point". The cited case holds that the rule of imputed negligence cannot be used to bar recovery by one member of a joint venture against another member. In the cited case the facts revealed no contributory negligence.

The case of *Crawford v. Rose* (D.C. App. Cal. 1934) 39 P. 2d 217, cited at page 119 of appellant's brief, involved a guest riding in a rumble seat, bundled over his head by a blanket to ward off fog and cold, certainly evidencing no factual parallel with any facet of this case. Similarly the case of *Binford v. Purcell* (Br. 19) is not applicable.

The cases cited by counsel to the point that the guest had ". . . no duty to leave the vehicle. . ." (Br. p. 20) do not support that point.

In *Squyres v. Baldwin* (La. 1938) 185 So. 14 the vehicle, being driven in a snow storm at slow speed, struck a moving train at a grade crossing. The court said:

> "Merely because it was dark and snowing, the law does not require plaintiff and Johnson (driver) to remain at home, any more than it obligated the railroad to cease the operation of its cars; nor did

> it impose upon plaintiff the duty to get out and walk in the elements rather than continue by automobile."

In the *Squyres* case (supra) and as well in the cited cases of *Richard v. Maine Central Railroad Co.,* 168 A. 811; *Van Fleet v. Heyler,* 125 P. 2d 586, and *Meighan v. Baker,* 6 P. 2d 1015 the test posed by the court did did not relate to a duty to leave the vehicle, but that the:

> "question is whether they failed to take reasonable precautions under the conditions . . ." (*Richard v. Maine Central Railroad,* supra).

the same rule fully expressed in the *Murphy v. Smith* case, supra.

In summation: Appellant's decedent assumed all of the hazard inherent in the operation of a vehicle without brakes. The casualty happened within the area of the risk assumed, and as a consequence recovery cannot be allowed. In addition, by testimony of the plaintiff's own witness (Tr. p. 301), it was shown that if Mrs. McDonald had been able to shift into the low gear, or had shifted into the low gear before beginning the grade down the mountain, nevertheless the car could have attained a speed of 70 to 75 miles per hour; and the evidence also showed that there were at least two curves having a safe speed of 25-30 miles per hour (Tr. pp. 293-294). The evidence amply sustains the trial court's position that there was no new act of negligence to which plaintiff was not contributorily negligent, as the failure to do a useless act is not negligence.

POINT (d) THE TRIAL COURT ERRED IN ADOPTING CONCLUSION OF LAW NUMBERED III.

POINT (e) THE TRIAL COURT ERRED IN ENTERING A PERSONAL JUDGMENT AGAINST APPELLANT (emphasis supplied).

Argument.

Appellant's objection to Conclusion of Law III, and judgment against them for costs, is based on a completely fallacious conception of the Conclusion and Judgment. Appellant feels that the judgment for costs is against Earl Aronson individually because he brought the suit. It is not. It is against Earl G. Aronson, Earlene A. Roberts, Betty C. Howard and Earl G. Aronson, Jr., *the persons for whose benefit this action was prosecuted.*

The authority for the judgment is 55-11-65 ACLA 1949, as follows:

> "In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute to prosecute or defend therein, costs shall be recovered as in ordinary cases, but such costs shall only be chargeable upon or collected off the estate, fund, or party represented, unless the court or judge thereof shall order the same to be recovered off the plaintiff or defendant personally for mismanagement or bad faith in such action or the defense thereto."

It is noted from the statute that the administrator personally, when he is bringing an action, is not liable for costs but the costs of the action are chargeable against the "estate". If the action is by the trustee of an express trust, then the costs are recoverable not

from the trustee but of the "fund" thus represented. However since the action is brought "by a person expressly authorized by statute to prosecute" then the costs are recoverable from the "party represented".

The Alaska statute providing for wrongful death actions, Ch. 89, S.L. 1949, is as follows:

> ". . . the personal representatives . . . may maintain an action . . . for an injury done . . . and the amount recovered, if any, shall be exclusively for the benefit of the decedent's husband or wife and children . . ."

Of the three situations presented in the statute certainly the second is not applicable here. By counsel's own position the third one is applicable. Certainly this action is prosecuted under the authority of the statute. It is only incidental that the person named in the statute as authorized to sue is the administrator or executor of the estate. In this law suit there is no contention that the administrator is suing for the estate or on behalf of the estate or is exercising any right of the estate. Conversely it is directly plaintiff's position that he is suing under authority of the statute for the sole and exclusive benefit of the persons named in the pleading. Not one cent of the recovery under plaintiff's theory could or would go to the estate, and accordingly the estate should not be charged with any of the costs. All of the recovery sought under the pleadings would be distributed to the persons represented by the administrator; and under the act, those are the persons that costs must be charged against.

Wien Alaska Airlines, Inc. v. Sammuel Simmonds, et al., No. 15,149 of this court, decided Feb. 11, 1957.

III.

CONCLUSION.

There is no merit, in fact or in law, in any point presented by appellant by this appeal. Appellant's motion to amend is not only moot, but not well taken. The refusal to admit Identification No. 5 was not only correct, but even if incorrect, presents no reversible error. The statutes of Alaska require, upon a finding for defendant, a judgment for costs against the beneficiaries of the action. And from the whole record the findings of the court are well supported and sound, and no showing has been, or can be, made indicating any Findings to be in any particular "clearly erroneous". The decision of the district court should be affirmed.

Dated, Fairbanks, Alaska,
April 23, 1957.

Respectfully submitted,
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Service acknowledged by receipt of copy this 23rd day of April, 1957.

MAURICE T. JOHNSON,
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